IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-160

MARINE DEVELOPMENT CORPORATION,
Petitioner,

v.

MRS. ALANA G. HEIMAN, In Her Own Right; SANDRA JEAN HEIMAN, by MRS. ALANA G. HEIMAN, Her Mother and Next Friend; and H. MAURICE MITCHELL and JOSEPH W. GELZINE, Co-Administrators in Succession With Will Annexed of the Estate of Max Heiman, Deceased; BOATEL COMPANY, INC.; KOHLER CO. and MEDLIN MARINE, INC.,
Respondents.

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Respondents.

RESPONDENTS' BRIEF

In Opposition to

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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I

THE PETITION OF MEDLIN MARINE, INC.

Medlin Marine, Inc. petitions for certiorari as to the respondent survivors of Max Heiman solely on the ground that "the

trial court erred in projecting a specific rule of inflation over Max Heiman's life expectancy in measuring damages for loss of future earnings." Medlin argues that the decision of the Court of Appeals for the Eighth Circuit conflicts with other circuits. The simple answer is that there is no opinion of the Court of Appeals on this point. On rehearing in banc the panel opinion was withdrawn, and the District Judge, whose opinion was unpublished, was affirmed in a two sentence order.

The District Judge did permit an economist to give his opinion on future inflationary trends and discount rates. However, he did not accept the figures used by the economist in either regard. As the panel of the Court of Appeals stated:

> Nonetheless, in the instant case, the trial judge has set forth his factual findings, which clearly show that the court rejected the economist's analysis and applied his own understanding and experience of inflationary impact on future contributions. Judge Eisele in rejecting the economist's testimony used a 5½% present value discount rate and then applied an inflationary factor of 4%, resulting in a discount of the projected earnings by 1½%. The economist estimated loss of future contributions to Mrs. Heiman as $760,276; Judge Eisele's figure was $350,910. (A. 17)

The weight of authority in the various Courts of Appeal permits the factfinder to consider inflation in awarding damages. *Bach v. Penn. Central Transportation Co.*, 502 F.2d 1117 (6th Cir., 1974); *Riha v. Jasper Blackburn Corporation*, 516 F.2d 840 (8th Cir. 1975); *U.S. v. English*, 521 F.2d 63 (9th Cir. 1975). Cases in the various Circuits were reviewed in the latter decision and only the First Circuit was listed as following a contrary view. *Williams v. U.S.*, 435 F.2d 804, 807 (1st Cir. 1970). The latter Circuit has been joined by the Fifth, *Johnson v. Penrod Drilling*, 510 F.2d 234 (5th Cir. 1975). There is a division of authority in the Circuits on whether an economist should be

allowed to testify as to future long term rates of inflation. The Court of Appeals for the Eighth Circuit, while permitting the jury to consider inflation trends, has frowned on testimony from an economist projecting an inflationary rate over a long period of time. *Riha v. Jasper Blackburn Corp.*, 516 F.2d 840 (8th Cir. 1975) and *Johnson v. Serra*, 521 F.2d 1289 (8th Cir. 1975). These were however diversity cases applying Minnesota and Nebraska law. In a diversity case where Iowa law was applied, the Court took into account inflationary factors in affirming a verdict attacked as excessive. *Merchants National Bank of Cedar Rapids v. Waters*, 447 F.2d 234, 239 (8th Cir. 1971). See also the concurring opinion of Bright, J. in *Beanland v. Chicago, R.I. & P. RR*, 480 F.2d 109 (8th Cir. 1973, an FELA case).

The Ninth Circuit in *U.S. v. English*, 521 F.2d 63 (9th Cir. 1975) has approved the admission of testimony from an economist as to future inflationary trends. This view is supported by the leading modern work on wrongful death, where it is stated: "The decisions are almost, but not entirely, unanimous in allowing consideration of economic trends in assessing damages." S. Speiser, *Recovery for Wrongful Death* (1966), p. 524. Mr. Speiser discusses in Section 8:11 pp. 526-28, the use of testimony to establish future inflationary trends: "In order to determine what the earnings of the decedent would have been in the future, the jury should have some evidence to guide them as to what wages and prices will be in the future. The evidence is available in abundance through expert testimony of economists, estate planners and life insurance experts, and through judicial notice of various studies made by Congressional Committees and the Department of Labor's Consumer Price Index."

The principal case relied on by petitioner is *Sleeman v. Chesapeake & Ohio Railway Co.*, 414 F.2d 305 (6th Cir. 1969). With reference to this case Judge Lay (author of the panel majority opinion in case at bar) observed in *Riha v. Jasper Blackburn Corp.*, 516 F.2d 840 (8th Cir. 1975) that

the "Sleeman case has been weakened by the Sixth Circuit's later observation that the reference to the exclusion of evidence of future inflation there was mere dictum. (See *Willmore v. Hertz Corp.*, 437 F.2d 357 (6th Cir. 1971) wherein that court permitted such evidence to be considered by a jury under Michigan law)". He also pointed out that the case "is additionally weakened by the Sixth Circuit's latest opinion in a case involving an action under the FELA" and observed that this case, *Bach v. Penn Central Transportation Co.*, 502 F.2d 1117 (6th Cir. 1974) does not even mention *Sleeman*.

The inflation point urged by Medlin, which it now claims is such an important question of Federal law, was not even briefed by any of the parties after the Eighth Circuit granted rehearing en banc, as an examination of the supplemental briefs filed in the Court of Appeals will show.

In summary the following points should be noted.

(1) The District Judge cut the figures advanced by the economist more than fifty percent.

(2) The District Judge did not use the inflation factor to build up the damages. He only used an inflation factor to partially balance off the discount rate. The effect of his overall findings was to discount future contributions substantially. Such a procedure was suggested by Judge Friendly in a 1971 case, in the event inflation continued at a high rate. *Yodice v. Koninklijke Nederlandsche Stoom Maat*, 443 F.2d 76 (2d Cir. 1971). Between 1971 and 1975 it has become much worse.

(3) The rule for review of factual findings in a non-jury admiralty case is that the judgment must be clearly erroneous. *McAllister v. U. S.*, 348 U.S. 19 (1954). Surely it cannot be said that the careful analysis of the inflation factor by the District Judge was clearly erroneous.

(4) In a non-jury admiralty case there is a broad discretion vested in the U. S. District Judge as to the reception of evidence. *Santa Marine Service, Inc. v. McHale*, 346 F.2d 147 (5th Cir. 1965).

(5) If petitioner disagreed with the economist about inflationary trends, why did it not contest this testimony with its own counter-experts.

(6) Even if the admission of the testimony by the economist in the case at bar was error, it was not prejudicial because the District Judge arrived at his own figure on the inflationary factor and the discount rate. If the economist's testimony is completely eliminated from the record, the District Judge's conclusions in these respects are patently reasonable.

(7) The reasonableness of the award in this case is shown by consulting D. Thorndike, *The Thorndike Encyclopedia of Banking & Financial Tables* (1973). These tables show that the Heiman family would have to pay $291,600 for an annuity which would pay $22,500 (contributions, not wages) annually over decedent's life expectancy. This is computed at a 5½% interest rate not taking into account the inflation factor. Only $78,600 in excess of this amount was awarded for future contributions of Mr. Heiman to his family. Thus diminution in the purchasing power of the dollar constituted only a small part of the award.

II

THE PETITION OF MARINE DEVELOPMENT CORPORATION

Marine makes an unusual contention in this case. "First, Marine Development Corporation contends it is not liable for failure to warn on the basis of the trial court's own findings." In other words, Marine does not attack the court's findings of fact. In the face of these findings, Marine says it is not liable *as a matter of law*. The court's findings with regard to Marine Development are set out in Marine's Petition, Appendix J, pp. 64-69. Marine could hardly argue that such findings are clearly erroneous. As a matter of fact they are supported by overwhelming evidence. Given these findings, respondents submit that the following is the applicable law.

As noted in Noel and Phillips, *Products Liability* (West Pub. Co. 1974), p. 161, a distinction should be drawn between the duty to give adequate directions for use and the duty to warn. The authors then make a statement that fits Marine's situation like a glove: "Directions are calculated primarily to secure the efficient use of a product. *Where, however a departure from directions may create a serious hazard, a separate duty to warn arises.*" (Emphasis added.) They then cite *McLaughlin v. Mine Safety Appliances Co.*, 11 N.Y.2d 62, 226 N.Y.S.2d 407, 181 N.E 2d 430 (1962). This case involved heat blocks used to help revive injured persons. Instructions to wrap the blocks in insulating material before using were given, but there was no statement that if used without insulation the blocks cause serious burns, as they did to the plaintiff. In stressing the need for a warning, the court observed that "*Instructions*, not particularly stressed, do not amount to a *warning of the risk at all*. . . ." (Emphasis by court.) *Id.* at 434.

Admittedly in this case, Marine, in stating that the unit should be located in the space to be cooled. was only concerned with "efficient use of its product." In no sense was this statement a warning. The Restatement of Torts emphasizes a supplier's duty, where a product is likely to be dangerous for its intended use, to exercise reasonable care to inform users "of its dangerous condition or of the facts which make it likely to be dangerous." *Restatement, Second, Torts*, § 388(c).

The same is made by Frumer and Friedman, *Products Liability*, § 8.05[1]:

> There is substantial authority that the manufacturer must give both adequate directions for use and adequate warning of potential danger. Directions and warnings serve different purposes. Directions are required to assure *effective* use, warning to assure *safe* use. It is clear from the better-reasoned cases that directions for use, which merely tell how to use the product, and which do not say anything about the danger of foreseeable misuse, do not necessarily satisfy the duty to warn.

One of the cases cited in this section is *Jackson v. Baldwin-Lima-Hamilton Corp.*, 252 F.Supp. 529, *cert. den.* 385 U.S. 803 (1966), a diversity case tried in Pennsylvania but applying Arkansas law. The basis of liability was a failure to warn users about lubricating a vital part of a crane whose malfunction caused the death. The part was not on the lubrication chart, even though there were general instructions about proper lubrication.

Farley v. Edward E. Tower & Co., 271 Mass. 230, 171 N.E. 639 (1930), 86 A.L.R. 941 (1933), makes the very point *that a statement that a product is not designed for a particular use is not the equivalent of a statement that such use is hazardous.* The product involved was an inflammable comb, and the insufficient warning consisted of "not designed to be used for

the dressing of hair together with a machine that was designed to produce heat." *Id.* at 643.

Another important case is *Panther Oil & Grease Mfg. Co. v. Segerstrom*, 234 F.2d 216 (9th Cir. 1955), which involved explosion of a primer. The court said that even if the pamphlet of instructions related intelligibly to the primer as distinguished from the roof coating product, "we think the instruction it contained does not reach the point attempted to be made. It actually says no more than the heating or thinning of the product will damage its waterproofing qualities. The injunctions both as to heating and thinning are directed toward the mere matter of utility. There is no warning or suggestion that the heating of it would or might pose a hazard of any sort or a consequence other than as stated." *Id.* at 218. See also *Butler v. Sonneborn Sons, Inc.*, 296 F.2d 623 (2nd Cir. 1969).

The *Restatement, Second, Torts*, § 388 sets out the governing principles of a failure to warn theory based on negligence. However, failure to warn as pointed out in the *Restatement Second Torts*, § 402(A), Comment (j), may also provide a basis for strict liability in tort. For two recent Ninth Court cases basing strict liability in tort on failure to warn see *Nelson v. Brunswick Corp.*, 503 F.2d 376 (9th Cir. 1974) and *Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809 (9th Cir. 1974). See also discussion of the latter case in Frumer & Friedman, *Products Liability*, Vol. 2, § 16A pages 336.1 through 336.4.

In negligence cases the three factors generally used to determine the existence of a duty are: (1) The likelihood of an accident when the product is put to foreseeable use without warning; (2) the probable seriousness of injury if an accident does occur, and (3) the feasibility of an effective warning. See Noel and Phillips, *op. cit. supra*, p. 162. All these elements were present in the case at bar.

Frumer & Friedman discuss the legal basis of the duty to warn in Sections 8:01 through 8:05. Scores of cases are cited. A landmark case in this court applying Michigan law is *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). "A head-on collision, with the impact occurring on the left front of the Corvair, caused a severe rearward thrust of the steering mechanism into the plaintiff's head. . . . The plaintiff's complaint alleges . . . (2) negligent failure to warn of the alleged latent or inherently dangerous condition to the user of the steering assembly placement. . . ." *Id.* at 496. In unanimously reversing a summary judgment for defendant, the court said, "The failure to use reasonable care in design or knowledge of a defective design gives rise to the reasonable duty on the manufacturer to warn of this condition." *Id.* at 505.

In *Alman Bros. Farm & Feed Mill, Inc. v. Diamond Labs, Inc.*, 437 F.2d 1295 (5th Cir. 1971), the court observed that there is a duty to warn where a dangerous product is involved. An Illinois Court of Appeals had occasion to consider whether a carbon monoxide producing appliance was a dangerous instrumentality. In *Beadles v. Servel, Inc.*, 344 Ill.App. 133, 100 N.E.2d 405 (1951), plaintiffs were overcome by carbon monoxide produced by a gas refrigerator. In holding that a cause of action was stated on failure to warn, the court said: "Applying this test to the refrigerator in the case at bar, we cannot hold, as a matter of law, that a mechanism so designed and constructed as to, or which in ordinary operation does, give off deadly carbon monoxide gas is not an inherently dangerous instrumentality." *Id.* at 410.

In the case at bar the petitioner Marine knew that its system would be used with a gasoline-powered generator that would produce carbon monoxide in a non-airtight engine compartment. *It knew or should have known that it was dealing with a potentially dangerous situation.* Section 388 of *The Restatement, Second, Torts* has been held to constitute a basis for liability in

products cases on many occasions. It was cited and relied on by the Fourth Circuit in *Gardner v. Q.H.S., Inc.*, 448 F.2d 238 (4th Cir. 1971), holding that a jury question was presented as to the adequacy of a warning that hair rollers were inflammable. It was cited in *Brizendine v. Visador Co.*, 437 F.2d 822 (9th Cir. 1970), in holding the manufacturer of door glass liable for injuries when the glass shattered and injured a bystander. It was relied on specifically in *Tomao v. A. P. De Sanno & Son*, 209 F.2d 544 (3rd Cir. 1953) where the manufacturer of a grinding wheel was held liable for injuries caused by its disintegration.

Section 388 was cited in *Blitzstein v. Ford Motor Co.*, 288 F.2d 738, 742 (n. 14) (5th Cir. 1961). This was a diversity case arising in Alabama in which it was claimed that failure to ventilate the trunk of an automobile caused an explosion and injuries to the driver. The court based its decision reversing a directed verdict on failure to warn.

Marine does not attack the fact findings or the above quoted governing principles of law. Marine simply argues that these well recognized legal principles do not apply to component-manufacturers but only to the manufacturers of finished products. It argues that this court should so hold as a matter of law "to have uniformity of decision among the courts of appeal." (Marine Petition p. 8). Marine has, however, cited no conflicting Court of Appeals decision in this respect. In fact we are unable to find any case either in petitioner's brief or elsewhere that supports such a novel argument. Frumer & Friedman, *Products Liability*, Vol. 1 §9.01 states that "the cases generally make it clear that the manufacturer of a component part is just as liable for defects in the part due to his negligence as any other manufacturer." Many cases are cited where liability has been imposed against compound manufacturers for defective products. Failure to warn makes a product defective as pointed out, *supra*, *Restatement, Second, Torts*, § 402(A) Comment (j); *Nelson*

v. Brunswick Corp., 503 F.2d 376 (9th Cir. 1974); *Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809 (9th Cir. 1974).

Supreme Court Rule 19 sets out the bases for the granting of a petition for certiorari to this court from a U.S. Court of Appeals. A reading of this rule shows a complete absence of any ground for certiorari in this case.

Respectfully submitted,

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